IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.04.2007

CORAM:

THE HONOURABLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.1340 of 1994

1. Anantham Ammal
2. Murugesan
3. Rangarajan
4. Jayanthi .. Appellants/Plaintiffs/Appellants

-Vs-

1. Kamalambal (Exparte)
2. Balasubramanian
3. Rajammal (Exparte)
4. Lalitha (Exparte)
(R-1 and R-4 dismissed with vide order of this Court, dated 28.09.2006) .. Respondents/Defendants/Respondents

APPEAL under Section 100 of the Code of Civil Procedure against the judgment and decree passed in A.S.No.51 of 1990 on the file of the Subordinate Judge, Nagapattinam, dated 23.06.1993, as confirmed the judgment and decree passed in O.S.No.224 of 1983, dated 31.10.1989, on the file of the District Musnif Court, Thirutharaipoondi.

For Appellants : Mr. N.Pappiah
For Respondents : Mr. N.Srinivasan, for R-2.
No appearance, for R-3.

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J U D G M E N T

The unsuccessful plaintiffs in the Courts below are the appellants in the above second appeal. The plaintiffs filed the suit for declaration of title and possession apart from rendering of accounts. The suit property is described as comprised in R.S.No.202/14 in 0.10 cents manai with thatched house bearing Door Nos.7 and 8, Thoothukudi Town and circle, Nagapattinam District, of course with boundaries on all the four

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sides. The plaintiff laid the case on the basis that the said properties were originally owned by Ramu Chettiar, husband of the first plaintiff and father of plaintiffs 2 to 4, and his purchase was under a registered sale deed dated 04.10.1939, marked as Ex.A-26 and he was in possession till his death in 1961 by residing in the said house. He is also stated to have mortgaged the said house, by way of Mortgage Deeds, on 11.04.1944 and 27.07.1943 marked as Exs.A-23 and A-24 respectively. It is the case of the plaintiffs that after the death of Ramu Chettiar, they were living in the said suit property. Since they had no one to support them, the first plaintiff's sister, who was in Assam took the plaintiffs and the fourth defendant to Assam leaving the house under the control of the two tenants. At the time when the plaintiffs went to Assam, they requested the first defendant, who is the sister of Ramu Chettiar, to collect the rent from the tenants and she has also leased out the house to various tenants. The second defendant is the son of another sister of Ramu Chettiar. The first defendant has also written many letters to the plaintiffs. Since the first defendant had no issues, she had brought up the second respondent as her adopted son.

2. According to the plaintiffs, the first and second defendants have colluded with each other and created various documents taking advantage of the absence of the plaintiffs and in that way, a sale deed was obtained from one Suseela Rajagopalan in the year 1975 for the same land, but with the different survey number in respect of three cents without mentioning any boundaries. Inasmuch as, the said Suseela Rajagopalan is not the owner of the property, the second defendant, who has stated to have purchased the property from her cannot have any right. Even in respect of the suit property the second respondent has set up the title as if he has purchased the said property before 20 years that is on 20.05.1975. The plaintiff would also submit that in respect of the Rent Control Proceedings also, the second defendant has stated that he has acted as the Agent of the plaintiffs. The second defendant has obtained the change of the assessment from Panchayat in respect of the suit property in his name. Both the first and second defendants have not paid any amount of rent to the plaintiffs, even though they have collected the same from the tenants on behalf of the plaintiffs. The first and second defendants are liable to put the plaintiffs in possession and therefore, the suit has been filed.

3. The fourth defendant is the daughter of the first plaintiff and she is also entitled for the joint possession. The said suit was defended by the second defendant, denying the title of the plaintiffs and the second defendant has also relied upon an earlier order of this Court, wherein the title of the

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plaintiffs was not accepted. The second defendant also disputes that the boundary given in the plaint are not correct and the disputed property is situated only in R.S.No.202/14 and not in 202/13. According to the second defendant, the husband of the first plaintiff-Ramu Chettiar did not reside in the property and in fact, eight years before his death, Ramu Chettiar had shifted to Thanjavur and at that time, he had sold the property to the second defendant's father. However, there was no document given in writing. But the super-structure was put up by the second defendant's father and the second defendant continued to be in possession for more than twenty years and in enjoyment by changing the mutation of public records in his name. The case of the second defendant is that even though he has taken sale deed for a lesser extent, he is in possession of the entire suit property and the document for three cents was made by mistake. However, according to him, the boundaries are stated, therefore, the boundaries will prevail. It is also the case of the second defendant that after the death of Ramu Chettiar, the plaintiffs went to Assam and settled there itself permanently and they have abandoned the suit property. It is also the case of the second defendant that the plaintiffs are aware of the receipt of sale price and oral sale in favour of the second defendant.

4. It is also the case of the second defendant that the second defendant has never acted as an Agent of the plaintiffs. Even though the second defendant has perfected the title by adverse possession and prescription in respect of the suit property and out of care and caution, he purchased the property from the real owner Suseela Rajagopalan to the entire extent of 10 cents in R.S.No.202/14 and building thereon, that was under the sale deed dated 26.04.1975 marked as Ex.B-1.

5. On an analysis of the entire evidence and appreciation of documents, the Trial Court has dismissed the suit filed by the plaintiffs, after giving a finding that the second defendant has been in possession, as seen in various documents filed on the side of the defendants, including Ex.B-70. It was as against the said judgment, the plaintiffs have filed the first appeal and the First Appellate Court also finding that there is no material irregularity or wrong appreciation of evidence etc., has dismissed the appeal against which the plaintiffs have filed the present second appeal.

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6. While admitting the above second appeal, the following substantial questions of law were framed:-

> "1. Whether the findings of the Courts below that title of the plaintiff has not been established on the basis of Exs.A26, 23, 24, 12, 13 and A62 are sustainable?
> 2. Whether the plea of oral purchase and adverse

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possession on the part of the defendant is sustainable?"

7. The above second appeal was already dismissed as against the first and fourth respondents, by an order of this Court, dated 28.09.2006. The third respondent has not appeared inspite of service. It is only the second respondent, who has appeared through counsel.

8. According to the learned counsel for the appellants, when the plaintiffs have produced the document, namely Ex.A-26, under which the first plaintiff's husband-Ramu Chettiar has purchased the property and it is the case of the second defendant that Ramu Chettiar, eight years before his death, which was in 1961, has orally sold the property in favour of his father, it was for the second defendant to prove the same, especially in the circumstance that till the year 1978, the property tax has been standing only in the name of the Ramu Chettiar and it was only after that, the second defendant has made change. It is also the contention of the learned counsel for the appellants that when the second defendant has chosen to claim title by adverse possession, the condition must be that he must admit the ownership of the plaintiffs and then prove that to the knowledge of the plaintiffs, he has been in possession of the property for more than the prescribed period and according to the learned counsel, there was no evidence produced by the second defendant to prove adverse possession. He would also state that admittedly the second defendant has denied the title of the plaintiffs and therefore there was no question of adverse possession in such circumstances. He would also state that if adverse possession is claimed by the second defendant against the plaintiffs on the basis that the first plaintiff's husband-Ramu Chettiar has orally sold the property to the second defendant's father, eight years prior to 1961, what is the necessity for the second defendant to get a sale deed from Suseela Rajagopalan in respect of the said suit property under Ex.B-1-sale deed dated 26.04.1975, especially when the recital of the said document contains that it relates to three cents, whereas the suit property is to the extent of 10 cents.

9. On the other hand, the learned counsel for the second respondent would rely upon Exs.B-14 to B-16, which are all demand notices sent to the second defendant in respect of the suit property relating to the years 1973 and 1980 and so on, and subsequent documents under which the second defendant has paid the property tax as seen in Exs.B-17 to B-30 and there are various documents filed on the side of the second defendant to show that he has been in continuous possession. He would also submit that Ex.A-26-Sale Deed, dated 04.10.1939, purchased by Ramu Chettiar itself contain the boundaries, which are defective

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and there has been contradictory clauses. He would submit that while the plaint reveals the survey number of the property as 202/14, Ex.A-26 states the survey number as 202/13. On the other hand, Ex.B-1-sale deed by which the second defendant has purchased the property is relating to 202/14 and even though it is in respect of three cents, it is in the categoric stand of the second defendant that he has been in enjoyment of the entire extent of ten cents.

10. A reference to the judgments of both the Courts below show that on fact both the Courts have come to the conclusion that the second defendant has been in possession of the property for more than the prescribed period and in any event perfected title by adverse possession. The Courts below have also found, by referring to Ex.A-26-sale deed, by which Ramu Chettiar has purchased the property that there has been some discrepancy in respect of the survey number and also the boundaries by referring to evidence of P.W.1-herself, and also have come to the conclusion that the plea of Agency given to the second respondent to collect rent has not been proved.

11. In view of the above said factual findings by both the Courts below in respect of the possession of the suit properties by the second defendant for more than the prescribed period, even assuming that the defence of the second defendant that his father has purchased the property by oral sale from Ramu Chettiar, namely, his brother, eight years before 1961, when he died, is not accepted, his continuous possession has been proved. As far the documents filed on the side of the plaintiff especially in respect of Ex.A-26-sale deed is concerned, there is a specific finding by both the Courts below that not only the survey number differs, but also the boundaries do not tally apart from the contradictory evidence of P.W.1 and in such circumstances, even if the contention of the plaintiff is admitted that Ramu Chettiar was the owner of the suit property, based on Exs.A-23 and 24, by which he has mortgaged the property in favour of third parties, on the claim of the second defendant that it was eight years before 1961 when Ramu Chettiar died, he has sold away the property in favour of the second defendant's father and based on the same, the second defendant and his father had been in continuous possession through out, it is certainly a finding of fact and I do not think that this Court can interfere with such finding of facts inasmuch as there is no material irregularity or perversity in such finding of facts. As I have considered the judgments of both the Courts below, this Court is of the opinion that the Courts below have given acceptable reasons.

12. In view of the above said position, as held by this Court in the judgment rendered in the case of Pappayammal Vs.

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Palanisamy and Others and reported in 2005 (3) C.T.C. 292, while exercising the powers under Section 100 of the Code of Civil Procedure in the second appeal in respect of the finding of facts recorded by both the Courts below, if they are not perverse or there is no irregularity, there is no question of interference. The relevant portion of the judgment wherein this Court has narrated the previous judgments in respect of the scope of Section 100 of the Code of Civil Procedure is follows:-

> "This Court, sitting in Second Appeal, invoking Section 100, C.P.C., cannot interfere with the findings, recorded by the two Courts below, which are based on proper appreciation of the evidence and the materials on record, and when there is no perversity or irregularity in those findings. As laid down by the Supreme Court in Ishwar Dass Jain (Dead) through LRs. V. Sohan Lal (Dead) by Lrs., 2000 (1) CTC 359 : 2000 (1) SCC 434; Deena Nath V. Pooran Lal, 2001 (5) SCC 705; Hafazat Hussain V. Abdul Majeed and others, 2001 (7) SCC 189 and Krishna Mohan Kul alias Nani Charan Kul and another V. Pratima Maity and Others, 2004 (9) SCC 468, the scope of Section 100, C.P.C. is so limited."

The facts of the case which I have narrated above also reveals that it is not as if the second defendant has been in possession of the suit property without the knowledge of the plaintiffs. The possession of the second defendant is open and continuous as found on facts to the knowledge of the plaintiffs especially in the circumstance of the relationship between the plaintiffs and the defendants and in the circumstances that it is admitted by the plaintiffs themselves that in the Rent Control Proceedings the second defendant while filing the counter affidavit has denied the title of the plaintiffs, it is certainly a hostile possession, which is a requirement, as held by the Honourable Supreme Court in the judgment rendered in the case of T.Anjanappa and Others Vs. Somalingappa and another reported in 2006 AIR SCW 4368 wherein the Honourable Supreme Court while holding that mere continuous possession for a long time is not sufficient, unless it is hostilely or expressly or impliedly a denial of title of the true owner and to the knowledge of the true owner, even though it is not necessary that there should be any evidence of the adverse possession actually informing the real owner. The operative portion of the judgment of the Honourable Supreme Court is as follows:-

> "22. It is well recognized proposition in law that mere possession however long does not necessarily means that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to

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constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession is denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

13. As correctly pointed out by the learned counsel for the second respondent, the scope of this Court to interfere with the findings of facts by both the Courts below while exercising jurisdiction under Section 100 of the Code of Civil Procedure, especially while speaking about the scope after the amendment of the Code of Civil Procedure and also by considering the legislative background in that regard, has been extracted only in respect of substantial question of law and as it has been categorically found by the Honourable Supreme Court in the various judgments including the latest judgment in the case of Gurdev Kaur and Others Vs. Kaki and Others and reported in 2007 (1) C.T.C. 334. The operative portion of the judgments is as follows:-

"70. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100, C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the Memorandum of Appeal. At the time of admission of the Second Appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted Second Appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended

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Section, was:
(i) The High Court would be justified in admitting the Second Appeal only when a substantial question of law is involved.
(ii) The substantial question of law to precisely state such question;
(ii) A duty has been cast on the High Court to formulate substantial question of law before hearing the Appeal;
(iv) Another part of the Section is that the Appeal shall be heard only on that question".

14. In view of the same, there is no substantial question of law involved in this case. Therefore, the above second appeal fails and the same is dismissed. However, there will be no order as to costs.
Srk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To
1. The Learned Subordinate Judge, Nagapattinam.
2. District Musnif Court, Thirutharaipoondi.
3. The VR Section, H igh Court, Madras

+ one cc to Mr. N. Srinivasan, Advocate sr no. 22111

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nm(23.04.07)

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